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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. 71 - 462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

Peter V. Millham, Esq.
101 Court Street
Laconia, New Hampshire 03246
Counsel for Respondent

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CORRECTIONS TO STATEMENT OF THE CASE

The Petitioner's statement of the case is essentially correct, insofar as it goes, with the following exceptions:

1. The statement of the case and of the issues uses the words "tenure" and "tenured" repeatedly. These words have never been used before in this case.

2. The bylaws do not limit the right of the Board of Directors to reappoint a doctor to the staff on those occasions when the Staff and Credentials Committee have recommended against reappointment. Under the bylaws the Board of Directors could refuse to reappoint a doctor whose reappointment has been recommended by the Medical Staff and the Credentials Committee. In this case, however, the Board of Directors in refusing to reappoint Dr. Bricker was acting in conformity with recommendations of the Staff and Credentials Committee.

3. The Petitioner has indicated that he was given no

statement of the complaints against his conduct, either before or at the hearing conducted by the Joint Conference Committee. While no formal written statement of complaints was given to him, the Trial Court has found that he was given oral notice of the complaints, and that he was aware of them. The Court also found that there was no requirement under the bylaws or under the general common law for a written specification of charges. The Court further found in response to Dr. Bricker's request for findings of fact No. 10 that "The October 14, 1970 meeting lasted from approximately 7:30 p.m. to 11:15 p.m., and the Court finds that this permitted Dr. Bricker ample opportunity to explain his actions which were the cause of his non-reappointment. In addition, his objectionable actions were adequately made known to him by formal and informal discussions with him over a long period prior to this meeting, and these actions were adequately reviewed at this meeting" and further, "The Court finds that Dr. Bricker had ample opportunity at the October 14th meeting to defend himself against all the charges made against him".

4. The Petitioner in his statement of the case indicates that "The Board voted to end the Petitioner's appointment". There was no vote to end the Petitioner's appointment. The vote of the Hospital Board of Trustees was not to reappoint Dr. Bricker since his previous appointment had expired.

5. The statement of the case indicates that certain new matter was presented at the hearing before the Court, over the objection of the Petitioner, which was not presented at the Joint Conference Committee hearing. I have reviewed the transcript of the witnesses Jordan, Colangeli and Morse and find no objections to that testimony. Therefore, I do not feel that it can be fairly stated, if there was any new material

presented in the hearings held before the Court, that timely objection was taken to this evidence by the Petitioner. The earliest claim of any impropriety of this evidence was in Paragraph 8 of the Plaintiff's requests for findings and rulings of law which were submitted several days after the hearing which asked as a matter of law that the Court not consider as bearing on the relief sought by the Plaintiff any charges or complaints against him not made at the October 14th hearing.

6. Petitioner also makes reference to his difficulty in attempts to engage counsel. That matter clearly has nothing to do with this case. Petitioner's personality probably had as much to do with it as anything else. The fact remains that by the second day of hearings on the Temporary Injunction he was represented by competent counsel and continued to be represented by competent counsel throughout the proceedings.

7. In all of the proceedings in this case up until the filing of this Petition for Writ of Certiorari there has never been any claim that the action of the hospital was "State action". There have merely been references to violation of the Petitioner's right of due process and claims that his rights under the Fourteenth Amendment have been violated.

REASONS FOR REFUSING TO GRANT THE WRIT:

I. THE DECISION DOES NOT INVOLVE A FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT AND WAS DECIDED IN A WAY WHICH WAS PROBABLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Petitioner claims that the right of a doctor to utilize the facilities of a non-profit private hospital is a right protected by the Fourteenth Amendment, but cites no United States Supreme Court cases for that proposition. The Supreme Court has spoken on this issue, holding that the right to practice medicine in a particular hospital, even a hospital run by the state or a city, is not a right protected by the Fourteenth Amendment. Hayman v. City of Galveston, 273 U.S. 414 (1927). Another case using reasoning consistent with Hayman, concerning rights protected by due process was Snowden v. Hughes et al, 321 U.S. 1, in which it was held that the right to be elected to a state office is not a right secured by the Fourteenth Amendment. Under these cases the right claimed by Dr. Bricker is not one which is protected by the due process clause of the Fourteenth Amendment, therefore his Petition cannot be maintained.

All of the cases cited by the Petitioner as grounds for application of the Fourteenth Amendment to a private, non-profit hospital are from Circuit Courts of Appeals and involve the equal protection clause of the Fourteenth Amendment. There is no claim of any violation of the equal protection clause by the Petitioner. It is submitted that the equal protection portion of the Fourteenth Amendment is much broader in scope than the due process of law clause, not being limited to cases involving the deprivation of "life, liberty or property". Therefore, it might very well be possible to find a denial of equal protection of the laws in a case which did not involve a deprivation of a right secured under the due process section.

In view of the language of the Hayman and Snowden cases it does not appear that the case as set forth by

Dr. Bricker's Petition is one in which the New Hampshire Supreme Court has rendered a decision within the legal vacuum, or which is contrary to prior decisions of the United States Supreme Court.

II. THE NEW HAMPSHIRE SUPREME COURT USED A PROPER STANDARD TO DETERMINE THE ISSUE.

In its decision the New Hampshire Supreme Court examined the two lines of authority concerning court review of the exclusion of a doctor from privileges in a private hospital and has adopted the evolving more liberal view; that the Courts will review the action of private hospitals to determine that it is not arbitrary, capricious or unreasonable. This was the test the New Hampshire Supreme Court applied in this case.

As far as the notice to Dr. Bricker is concerned, the Trial Court has found that he had actual knowledge of the complaints against him prior to going into the hearing; that at the hearing he had ample opportunity to rebut those complaints and to try to persuade his peers and the two laymembers of the Board of Trustees who were present that he should be reappointed. It is clear from the testimondy of Mr. Wadleigh, President of the Board of Trustees, and Mr. Cayley that they went into the hearing with open minds, hoping that the matter could be resolved and that Dr. Bricker could be reappointed. However, his intransigence and refusal to give any indication that he would try to get along in the future soon dissipated these hopes. The Trial Court has found upon the facts that these were basically fair proceedings; that Dr. Bricker

was given a fair hearing, and that the action of the hospital was neither arbitrary, capricious nor unreasonable. I do not find any decisions of the United States Supreme Court which set any higher standards for a group of volunteer laymen, who are attempting to administer a private charity even though that charity may accept contributions from the public and from government agencies.

III. THE QUESTION OF STATE ACTION WAS NOT RAISED BELOW.

It is a general rule that an Appellate Court will not hear issues which were not raised in the lower Courts. This rule applies equally to the U. S. Supreme Court with reference to Petitions for Writs of Certiorari. Ellis v. Dixon, 349 U.S. 458. Cleveland Etc. RR. Co. v. Cleveland, 235 U.S. 50. In this case the Petitioner has throughout the proceedings made a broad general claim that the proceedings of the hospital were violative of his rights of due process. In his pleadings he indicated that the hospital had received Hill-Burton assistance and donations from towns and private citizens. He has, however, never claimed that the action of the hospital consitituted "state action" such as would bring the action of the hospital within the ambit of the Fourteenth Amendment. He has introduced no evidence on that fact, and asked for no findings or rulings of law to the effect that this constituted State action. The closest that he came was in his first request for rulings of law, and this clearly does not go so far as to request a finding or ruling that the hospital's activities are state activities. He does not attack the issue directly in his brief, although some of the Circuit Court of Appeal cases cited in his brief, in support of his first reason for the granting of the writ, might generally support such an argument.

He cites no U. S. Supreme Court cases in support of the proposition that the action of the hospital constitutes state action. The U. S. Supreme Court has indicated that, even where a city operates a hospital, it is very questionable that the action by the governing authorities of the hospital can be "deemed action of the state". Hayman v. City of Galveston, 273 U.S. 414. It is submitted that the action of non-profit private hospital is not state action. To hold that the action of a non-profit state hospital is state action would lead to the logical conclusion that the action of almost every organization, whether it be business, profit or non-profit, corporate, individual or partnership, could be held to be state action because of the large number of federally financed and state financed programs now extant, which give the state some measure of control over some aspects of every enterprise, whether it be the individual business man or the corporate giant. The Fourteenth Amendment was never intended to extend so far.

IV. TENURE HAS NOT BEEN PREVIOUSLY CLAIMED BY THE PETITIONER.

The Petitioner has never previously claimed that he had rights of "tenure" or that his status was something that was equated to tenure. Doctors are appointed to the staff of the Sceva Speare Memorial Hospital for one year, and they must be reappointed each year if they are to continue to have hospital privileges. There are no statutes known to counsel which would affect this practice. Therefore, it cannot be said that there are any rights of tenure which extend beyond the one year period of appointment. The Petitioner's failure to raise such an issue, prior to his Petition for a Writ of Certiorari, prevents him from raising that issue now. Ellis v.

Dickson, 349 U.S. 458 Cleveland Etc. RR Co. v. Cleveland, 235 U.S. 50.

V. TRIAL COURT'S RECEPTION OF EVIDENCE CONCERNING ALLEGED ADDITIONAL CHARGES WAS NOT OBJECTED TO.

The Petitioner claims that it was a violation of the due process clause of the Fourteenth Amendment for the Trial Court to allow and consider the testimony of witnesses produced by the hospital as examples of the Petitioner's irrational, erratic and questionable behavior as it affects the hospital. The transcript of the testimony at the Berlin hearings on the Temporary Injunction was admitted in evidence at the hearings on the Permanent Injunction by agreement of both parties; therefore Dr. Bricker can have no objection to anything appearing in that testimony. The only other testimony produced by the hospital was the testimony of Louise Jordan, Bernard Colangeli, Sandell Morse and Dr. Kirk. No objection appears in the transcript to any of this evidence except for an occasional objection to portions which might have been considered to be hearsay, which objections were all always sustained. Under the practice in New Hampshire, objections must be taken at the time of the introduction of evidence, or objections are deemed waived. Barlow v. Virrill 88 N.H. 25. The court could, therefore, properly consider such evidence since no timely objection was taken. Further, it is submitted that it is reasonable to accept such evidence to show Dr. Bricker's behavior and personality, since it is the position of the hospital, which has been confirmed by the Courts, that Dr. Bricker's personality, behavior and temperament were detrimental to the interests of the hospital, and adversely affect his medical judgment. These

were not, therefore, additional charges, but illustrations of his behavior. On this issue it might also be pointed out that Dr. Bricker's own behavior in the Courtroom would have been evidence which the Court could consider. His demeanor on the witness stand, his response to questions, his request to be allowed to personally cross-examine Mrs. Morse, his standing at the podium feeding his attorney questions during cross-examination of witnesses all were evidence illustrating some of his behavioral problems, and certainly could be considered by the Court.

VI. EVIDENCE OF MALPRACTICE TESTIMONY WAS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

Dr. Bricker seems to attach far more importance to his "medical legal" activities than either the hospital or the Court. It is clear that the Court gave no weight to any evidence concerning Dr. Bricker's testimony in malpractice issues. It might again be indicated that counsel does not recall any objections being taken to such testimony, all of which was either adduced by questions asked by Dr. Bricker or his counsel, or upon cross-examination of Dr. Bricker. To the extent that the evidence was introduced by the hospital, it was introduced solely to show that Dr. Bricker's total involvement in cases took him away from the hospital at odd hours, and thereby causing him to come into the hospital at odd hours, and thereby causing operational problems in the hospital. However, the Trial Court specifically ignored the evidence concerning his medical malpractice work, and found that it was not unprofessional to testify in malpractice cases. Dr. Bricker commenced this action himself by a Petition for an Injunction. It is, therefore, an

equitable action, and the Court could rightfully hear all evidence concerning the matter before deciding whether the equities lay with Dr. Bricker or with the hospital. The case, therefore, is not a case in which the hospital brought charges against Dr. Bricker in the Courts of New Hampshire, but one in which Dr. Bricker had the burden of persuading the Courts in New Hampshire that equity demanded the relief requested.

VII. THE DIVISION BETWEEN THE HOSPITAL'S HEARING AND DECIDING BODIES HAS NOT BEEN RAISED BEFORE AND WAS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

This question was not raised before the Trial Court and was not raised before the Supreme Court of New Hampshire until after its decision. It was first raised in the Motion for Rehearing filed in August of 1971. It, therefore, is too late to entertain it at this time. There is no requirement in the Fourteenth Amendment that the body exercising the power also be the body which conducts the hearing. Morgan v. United States, 298, U.S. 468 does not state a contrary rule. In that case the statute under which the Secretary of Agriculture purported to act required the hearing to be held before the Secretary of Agriculture. The Assistant Secretary of Agriculture could not hold a hearing and have the order issued by the Secretary of Agriculture since it was contrary to the statute. Therefore this was a denial of due process. In this case there is no statute, rule of law or bylaw which requires the hearing to be held before the Board of Directors. Therefore, the procedure was entirely proper. Further the failure of the Board of Directors to give the reasons for denying his reappointment has never been raised before and cannot be raised now.

CONCLUSION

For these reasons and others obvious to the Court, a Writ of Certiorari should not be issued to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully submitted,

PETER V. MILLHAM

101 Court Street,
Laconia, New Hampshire 03246

October 26, 1971.